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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE CALIFORNIA OREGON POWER COMPANY,
a California corporation,
Petitioner,
versus
FEDERAL POWER COMMISSION,
Respondent.

No. 582

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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November, 1945

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE CALIFORNIA OREGON POWER COMPANY, a California corporation, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.
No. .....

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

*To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:*

Your Petitioner, The California Oregon Power Company, hereby petitions this Honorable Court for a Writ of Certiorari to be issued to review the order and judgment entered in the United States Circuit Court of Appeals for the Ninth Circuit on June 15, 1945 (Petition for Rehearing denied August 6, 1945) in the above entitled cause and respectfully shows:

### SUMMARY STATEMENT OF FACTS.

Petitioner, The California Oregon Power Company (hereinafter called the "Petitioner"), is a corporation duly organized and existing under the laws of the State of California. Petitioner is a public utility company engaged in the business of rendering electric and other utility services in the southern part of Oregon and the northern part of California.

On June 16, 1936, the Federal Power Commission (hereinafter referred to as the "Commission") by its order No. 42 prescribed a "Uniform System of Accounts for Public Utilities and Licensees" under the Federal Power Act, such system of accounts to become effective as of January 1, 1937, and in which system the Commission set forth certain rules with respect to the accounting procedure of the public utilities and licensees subject to its jurisdiction. Such system of accounts required, among other things, that public utilities and licensees subject to the jurisdiction of the Commission should ascertain the "original cost" of their electric properties, the term "original cost" being defined as meaning the cost of such property to the person first devoting it to public service.

Pursuant to the requirements of such system of accounts, Petitioner filed with the Commission a statement of original cost in compliance with Electric Plant Instruction 2-D of the Commission's system of accounts and its order of May 11, 1937, and subsequently and in March, 1941, filed with the Commission a revised statement of original cost in compliance with such Electric Plant Instruction 2-D.

Under date of May 26, 1941, the staff of the Commission, together with the staffs of the Public Utilities Commissioner of Oregon and the Railroad Commission of the State of California, issued a report (R. 908) covering the results of the examination made by the staff members of such three commissions of the statement of original cost or Electric Plant Reclassification studies made by Petitioner. Such joint staff report, among other things, recommended certain adjustments in the accounting reclassification prepared by Petitioner, including a proposed adjustment by which the amount of $645,359.19, representing alleged profits upon services rendered by Byllesby Engineering and Management Corporation, an affiliate company (hereinafter

referred to as the "Engineering Company"), would be transferred to Account 107, Electric Plant Adjustments.

On June 14, 1941, such joint report was transmitted to Petitioner with the request of the Commission that the adjustments indicated in such report be made and that plans be submitted by Petitioner for the disposition of the amounts established by its staff in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments.

On July 15, 1941 the Commission adopted an order (R. 1) requiring Petitioner to show cause at a hearing why it should not make the accounting adjustments proposed in such joint report and dispose of the amounts established in Accounts 100.5 and 107.

A hearing was held in San Francisco, California from February 26 to March 4, 1942. A motion was made by Petitioner that the hearing be continued so as to permit Petitioner to introduce evidence with respect to the services rendered to Petitioner by the Engineering Company and the reasonableness of the fees paid therefor, which motion was denied by the Trial Examiner.

On March 30, 1942 Petitioner filed a petition with the Commission (R. 16) requesting that it be given a further hearing so that it might be afforded the opportunity of introducing evidence with respect to the reasonableness of the fees paid by Petitioner to the Engineering Company, and evidence with respect to the nature of the services rendered by it to Petitioner. By order dated April 1, 1942 (R. 21), the Commission denied such petition.

On February 3, 1943 and without any further hearing or hearings, or any opportunity for Petitioner to adduce additional evidence on its behalf, the Commission issued its Opinion No. 87 and its order dated February 3, 1943

(R. 23), requiring that Petitioner make certain accounting entries and dispose of certain amounts in Account 100.5, Electric Plant Acquisition Adjustments, and Account 107, Electric Plant Adjustments.

Paragraph 1 of such order of February 3, 1943 (R. 36) requires that Petitioner dispose of an amount of $828,-684.97, representing the excess of acquisition cost of property over original cost established in Account 100.5, Electric Plant Acquisition Adjustments, by charging such amount to Account 537, Miscellaneous Amortization, in ten equal annual charges commencing with the calendar year 1942.

Paragraphs 2 and 7 of such order (R.37, 38) require that Petitioner transfer an amount of $636,237.23, representing alleged intercompany profits, from Account 100.1, Electric Plant in Service, to Account 107, Electric Plant Adjustments, and that Petitioner dispose of an amount of $636,237.23 established in Account 107, Electric Plant Adjustments, by charging Account 270, Capital Surplus, provided, however, that such amount should be charged to Account 271, Earned Surplus, if the Capital Surplus should not be created by May 15, 1943.

Paragraph 8 of such order (R. 38) requires, among other things, that Petitioner file with the Commission within 120 days from the date of service of such order certified copies of the entries required by such order.

Under date of March 5, 1943 Petitioner filed its petition for rehearing with respect to such paragraphs 1, 2, 7 and 8 of such order of February 3, 1943 (R. 39). Such petition for rehearing was denied by the Commission by its order of March 16, 1943 (R. 56).

Following the denial of such Petition for Rehearing by the Commission, Petitioner filed its Petition in the United States Circuit Court of Appeals for the Ninth Cir-

cuit (R. 77) for a review of such orders of the Commission entered April 1, 1942, February 3, 1943 and March 16, 1943, requesting that the Court set aside and annul said orders in so far as they (a) related to or required Petitioner to charge $828,684.97 against Account 537, Miscellaneous Amortization, or required the writing off or charging off of Petitioner's property; (b) related to or required Petitioner to transfer $636,237.23 from Account 100.1, Electric Plant in Service, to Account 107, Electric Plant Adjustments; and (c) related to or required Petitioner to charge said amount of $636,237.33, or any part thereof, against its Earned Surplus and Capital Surplus Accounts or required the writing off or charging off of any part of Petitioner's property, and requesting further that in the event that the Court should not set aside and annul said orders in so far as they related to the matters referred to under (a), (b) and (c) above, that said proceedings be remanded to the Commission for further hearings so that Petitioner might be afforded an opportunity to introduce further evidence therein, including evidence with respect to the reasonableness of the cost to Petitioner of the services performed by the Engineering Company and the nature and value of such services, and evidence establishing the fact that the cost to Petitioner of services performed by the Engineering Company was no greater than Petitioner would have had to pay if the services had been rendered by some other company.

Subsequent to the filing of such petition for review, Petitioner filed a motion (R. 1206) under the provisions of Section 313(b) of the Federal Power Act, 16 U. S. C. A. 825*l* for leave to adduce additional evidence with respect to services performed by the Engineering Company and the nature and value of such services, and evidence establishing the fact that the cost to Petitioner of the services

performed by the Engineering Company was no greater than Petitioner would have had to pay if the services had been rendered by some other company.

The Circuit Court of Appeals affirmed the order of the Commission (R. 1251)[1], denied Petitioner's motion for leave to adduce additional evidence, and denied a petition for rehearing.

The Commission has announced that the decision in the present case on the question of its right to reclassify the amount of $636,237.23 referred to above in Account 107, Electric Plant Adjustments, as representing profits to an affiliated engineering company, and to require the charging off of that amount in its entirety, will also be controlling with respect to the right of the Commission to compel similar action with respect to Oklahoma Gas and Electric Company of Oklahoma City, Oklahoma and Mountain States Power Company of Albany, Oregon, both of which companies are affiliates of Petitioner.

In the case of Oklahoma Gas and Electric Company the amount so involved is $1,643,137.28[2] and in the case of Mountain States Power Company the amount originally involved was $573,094.87[3]. Petitioner is advised that subsequent to March 6, 1944 the amount involved with respect to Mountain States Power Company was reduced to $434,997.02. The total amount at issue, therefore, in the present proceeding, either directly or indirectly, is as follows:

| | |
|---|---|
| As to Petitioner, Account 100.5 Electric Plant Acquisition Adjustments | $ 828,684.97 |

1 150 F. 2d 25.
2 Federal Power Commission Release No. 2363, dated February 22, 1944.
3 Federal Power Commission Release No. 2368, dated March 6, 1944.

| | | |
|---|---|---|
| As to Petitioner, alleged engineering profits | 636,237.23 | |
| | | $1,464,922.20 |
| As to Oklahoma Gas and Electric Company | $1,643,137.28 | |
| As to Mountain States Power | 434,997.02 | |
| | | 2,078,134.30 |
| Total | | $3,543,056.50[4] |

## STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Section 825*l*) and Section 240 of the Judicial Code, as amended (43 Stat. 938, Section I, 28 U. S. C. A., Section 347). The validity of the Federal Power Act (49 Stat. 847, 16 U. S. C. A., Section 791(a)) is involved. The order and judgment of the Circuit Court of Appeals (R. 1250) was entered June 15, 1945. Petitioner's Petition for Rehearing was denied August 6, 1945, and this Petition is filed within three months thereafter.

## QUESTIONS PRESENTED.

1. Where the Commission has arbitrarily labeled $636,-237.23 of the amount paid by Petitioner to the Engineering Company for services as a "write-up", and seeks to compel Petitioner to remove such amount from its plant accounts by charges to earned surplus or capital surplus, may the Commission, or its Trial Examiner, or the Court below, deny to Petitioner the privilege of introducing evidence

[4] In addition to the amounts involved with respect to Petitioner and its two affiliates, as shown above, it appears that the treatment of $269,016 of alleged inter-company engineering profits by Southwestern Public Service Company, a non-affiliate, will depend upon the final decision in the present proceeding. (Federal Power Commission Release No. 2491, dated August 7, 1944.)

with respect to the nature of such services and the reasonableness of the fees paid therefor.

2. Can the Commission, under the label of a uniform system of accounts promulgated under a law enacted in 1935, compel the removal from Petitioner's plant accounts of assets purchased in the course of building up an integrated utility system over a period of over thirty years preceding 1935?

3. Can the Commission compel Petitioner to remove $828,684.97 from its plant accounts, and to charge such amount against Petitioner's income over a period of ten years, simply because the amount paid by Petitioner for certain of its properties is $828,684.97 greater than the amount paid by the original owners for such properties when they were first devoted to public service?

4. Where there is no question as to the book value or the present value of Petitioner's assets, whether recorded in Account 100.5, or otherwise, is the Commission authorized to compel Petitioner to "dispose of" the amount of $828,684.97 reclassified by Petitioner in Account 100.5 by charges to its income?

5. By what authority can the Commission require Petitioner to dispose of the amount of $828,684.97 reclassified by it in Account 100.5 by charges to its income, when the Commission has not questioned the fact that such amount represents a part of the cost of electric properties purchased from strangers over a period in excess of thirty years, and where such properties form a part of Petitioner's integrated utility system?

6. Has the Commission authority to require Petitioner to use its earnings to bring about the fulfillment of an arbitrary accounting theory, where the use of each earnings for that purpose will deprive Petitioner's stockholders

of the right to receive their dividends upon the stocks owned by them, inasmuch as the disposition of the amount of $828,684.97 reclassified in Account 100.5, if charged off out of income over a period of ten years, as required by the order of the Commission, will necessarily diminish by $82,868 each year the amount of Petitioner's surplus, and to the extent that the required charging off of $636,237.23 sought to be established by the Commission in Account 107, out of Petitioner's earned surplus or capital surplus would diminish such earned surplus or capital surplus.

7. Has the Commission the authority to require Petitioner to eliminate $636,237.23, representing the amount determined by the Commission to be "intercompany profits" and a "write-up", from the property accounts of Petitioner, and to charge such amount to earned surplus or to capital surplus?

8. Is the Commission authorized to require Petitioner to restate its books and plant accounts so that Petitioner's assets will be recorded on its books at less than their actual cost?

9. Can the Commission invade the field of state regulation of public utilities by attempting to require Petitioner, a public utility subject to state regulation, to restate its books of account in a manner which makes it impossible for Petitioner in the future to show the cost of its properties on its books?

10. If the Commission, by the promulgation of a uniform system of accounts under Section 301 (a) of the Act (16 U. S. C. A. 825 (a) can be said to be authorized to order Petitioner to "dispose of" the amount of $828,684.97 reclassified by Petitioner in Account 100.5, and to order Petitioner to transfer $636,237.23 to Account 107 and to "dispose of" such amount, all as required under the Commission's order, can Section 301(a) be regarded as a valid and

constitutional enactment, or if the section is so construed does it violate the due process clause of Article V of the amendments to the Constitution of the United States, or contravene Articles IX and X of such amendments, or assume to confer judicial powers upon the Commission in violation of Article III of the Constitution?

## REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals involves questions of law, which should be settled by this Court, as follows:

(a) Can the Commission, under its uniform system of accounts, or otherwise, compel public utilities to charge off a part of their property?

(b) Can the Commission, under its uniform system of accounts, or otherwise, require the transfer of any amounts, as representing alleged profits on engineering services rendered by an affiliate company, from Account 100.1, Electric Plant in Service, to Account 107, Electric Plant Adjustments, and the charging off of the amount so transferred?

(c) Can the Commission, or its Trial Examiner, or the Court below, deny to Petitioner the privilege of introducing evidence with respect to the nature of services rendered by an affiliate company and the reasonableness of the fees paid therefor?

2. In affirming the order of the Commission the decision of the Circuit Court of Appeals is in conflict with sound accounting authority, with pertinent decisions of State regulatory commissions, with the American Telephone & Telegraph Company case,[5] the New York Telephone Company case,[6] and the Connecticut Light & Power Company case.[7]

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[5] *American Telephone & Telegraph Company, et al* v. *United States of America, et al*, 299 U. S. 232; 81 L. Ed. 142.

[6] *New York Telephone Company* v. *United States, et al*, 56 Fed. Supp. 932.

[7] *Connecticut Light & Power Company* v. *Federal Power Commission*, ... U. S. ...; 89 L. Ed. Adv. Op. 691.

## CONCLUSION.

For the reasons herein stated it is respectfully requested that this petition should be granted.

Respectfully submitted,

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